



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2007-06) *ENABLING LEGISLATION FOR COURT ORDERED PROBATE MEDIATION*

TO: State Bar Office of Governmental Affairs

FROM: Trusts and Estates Section, State Bar of California
Tracy Potts, Chairman, Executive Committee
Shirley Kovar, Chairman, Litigation Subcommittee
Kay Henden, Member, Executive Committee

DATE: June 9, 2006

RE: Enabling Legislation Authorizing the Court to Order Probate Cases Into
Mediation, And Also Order Source of Payment

Statutory Framework - New Probate Code §1051

SECTION ACTION AND CONTACTS:

Date of Approval by T&E Section Executive Committee: June 3, 2006
Approval vote: 10-0

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DIGEST: This legislation would permit the court to order mediation in any proceeding under the Probate Code upon motion of a party, by written stipulation of all parties, or upon the court's own motion. The order may include provisions for payment of mediation costs and fees.

PURPOSE:

California statutory law regarding the court's authority to order mediation in probate matters is nonexistent. (There is a limited pilot program for general *civil* matters in Los Angeles County (CCP §1775 et seq.), implemented by Rules of Court 1630-1639.)

Evidence Code §§1115-1128 set forth evidentiary rules relating to court-connected mediation, but do not specifically authorize the court to order its use. California Rules of Court 1620-1622.3 set forth rules of conduct for mediators in civil cases, but do not authorize the court to order cases into mediation, nor do they make reference to probate matters specifically.

The Advisory Committee Comment to CA Rule of Court 1620.3 states, "... Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. *Although the court may order participants to attend mediation...*" [emph added]. No statutory authority exists for such an order, however.

There is no case law upholding or rejecting a civil or probate court's authority to order cases into mediation.

2). What is the problem with the existing law?

The use of mediation in trust and probate matters is hindered by two practical issues. First, courts do not believe that they have authority to order cases to mediation, despite the fact that mediation is known to provide litigants with "... a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes." (CCP §1775(c)). Second, attorneys are reluctant to propose mediation in a given matter because of their concern that such a proposal may be viewed as an admission of weakness.

In addition, traditional litigation does not allow flexible solutions to the issues raised which are unique to trust and probate matters. These matters frequently involve complex estate and income tax issues, support issues for multiple generations of beneficiaries, and similar matters. Mediation allows development of case-specific solutions, while a court is limited to granting the relief requested.

3). How does this proposal remedy the problem?

This proposal specifically authorizes the court to proactively direct the parties into mediation, eliminating the court's concern regarding adequate authority, and "normalizes" the use of mediation in probate disputes, eliminating for the attorneys involved the stigma of proposing the process in a given case. In addition, the parties are given the opportunity to explore creative solutions involving complex planning techniques not otherwise available.

ILLUSTRATIONS: A contested probate case involved two sets of testamentary documents, one leaving the whole of a substantial estate to family members, the other leaving the same estate to friends and charities. Capacity of the testator to execute the latter set of documents was an

issue, and multiple drafting problems added to the confusion. All parties were in favor of finding a solution that preserved the tax benefits of one plan while allocating the estate fairly amongst the various beneficiaries. However, none of them were willing to be the first to propose mediation out of concern that such a proposal would be viewed as an acknowledgement of a weak or defective case. The court was also in favor of mediation, but did not feel it could order the process absent a stipulation by all parties.

DOCUMENTATION: No formal studies of this issue exist.

HISTORY: No prior legislation has addressed this issue.

PENDING LITIGATION: No pending litigation would be impacted by this legislation if enacted.

LIKELY SUPPORT & OPPOSITION:

Support

Why?

Trusts and Estates Section Executive Committee	Reduces financial and emotional costs of trust/probate litigation to the parties, and reduces burden on the courts
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Oppose

No opposition anticipated

FISCAL IMPACT: No public funds will be required to implement this legislation.

GERMANENESS: This matter requires the special knowledge, training, experience or technical expertise of the section because it relates to resolution of trust, probate and estate matters which are the special purview of the section.

TEXT OF PROPOSAL:

SECTION 1. Section 1051 is added to the Probate Code, to read:

1051. The court may order mediation in any proceeding under this code upon motion of a party, by written stipulation of all parties, or upon the court's own motion. The court's order may include provisions for payment of mediation costs and fees.